

Wetland Determination Memorandum of Agreement

Interagency Local Operating Procedures

For The Commonwealth of Virginia

Revised 8/15/2006

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Wetland Determination Memorandum Of Agreement

Virginia Interagency Local Operating Procedures

INTRODUCTION:

Specific procedures are needed that indicate how determinations of wetlands and other waters of the U.S. will be completed in Virginia for purposes of *Section 404 Of The Clean Water Act (CWA)*, *Subtitle B of The Food Security Act (FSA)*, and *Title 62.1 of the Code of Virginia-State Water Control Law (SWCL)*. This document establishes specific procedures that have been agreed to by the participating MOA agencies: The U.S. Army Corps of Engineers (Corps), the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS), the U.S. Fish and Wildlife Service (USFWS) and the Virginia Department of Environmental Quality (DEQ).

I. AGENCY RESPONSIBILITIES

A. Lead agency for Jurisdictional Determination/Delineation

1. On all lands when work is associated with conversion of land (e.g. wooded lands) to agricultural production:

NRCS for USDA Program Participants only

Corps for non-USDA Program Participants.

This includes: a) Modifications necessary to bring land into agriculture production (e.g. clearing, leveling, stumping);

2. Maintaining existing agricultural lands (e.g. crop and pasture lands) in agricultural production, including maintenance of ditches in those existing agricultural lands and perimeter ditches*.

NRCS for USDA Program Participants

Corps for non-USDA Program Participants

* Note: Corps considers land to be abandoned for Section 404 CWA purposes if out of agricultural production for 5 years

3. On all lands when work is not associated with agricultural production.

Corps

This includes : a) Activities that are part of an agricultural operation (e.g. farmhouses, farm ponds, ditches located outside of crop or pasture lands, poultry houses, etc.) but don't make production possible; and
b) Activities that are unrelated to agricultural production (construction of roads, houses, subdivisions, water supply reservoirs, buildings, mitigation banks, etc.)

4. Any Other Waters of the United States accompanying agricultural related activities but located outside of existing agricultural fields or pastures (rivers, streams, lakes, etc.)

Corps

This is without regard to the nature of the activity and includes channelized streams, ditches, and canals that convey agricultural runoff.

B. Dual Lead

1. When there is a need for determinations by COE and NRCS agencies (e.g., a determination is needed for an agricultural activity involving both wetlands and Other Waters of the U.S. or non agricultural lands will be converted to agricultural production), the agencies will coordinate to provide both determinations in the same time frame.

II. INTERAGENCY COORDINATION/CONSULTATION

A. Use of Virginia Worksheet

1. Purpose
To transfer information and facilitate coordination between the agencies in the Commonwealth of Virginia (See Appendix B). The worksheet will also be used for reporting violations.
2. Initiation
Staff representing any of the signatory agencies can initiate use of the worksheet. The agency initiating coordination fills out the worksheet, providing the required basic information. The worksheet is then forwarded to the appropriate agency (i.e. Corps, NRCS, DEQ).

B. Jurisdictional Determinations/Delineations

1. Non-Agricultural Land Determinations

Method: Determinations will be made using the U.S. Army Corps of Engineers 1987 Wetland Manual.

- a) For USDA Program Participants - NRCS makes certified wetland determinations for FSA purposes. These certified wetland determinations are not valid for CWA or SWCL purposes. The Corps must issue an approved wetland or water determination when there is CWA authority. The Corps will complete a determination within 45 days. During that period, the Corps will conduct any necessary site visits. The Corps will provide a copy of the approved jurisdictional determination to NRCS and DEQ. This determination will include information on any necessary permits, possible verification of nationwide or regional permits or agricultural exemptions.
- b) For non-USDA Program Participants - Determinations will be made by the Corps and do not require coordination with NRCS, although copies of determinations will be provided to DEQ.
- c) The Corps will determine if the wetland is subject to regulation under Section 404 CWA. If not, Corps will advise participant that authorization may be required from DEQ.

2. Agricultural Land Determinations

Method: Determinations will be made using the Virginia Mapping Conventions as part of the determination process.

- a) For USDA Program Participants – These determinations will be made by NRCS and do not require coordination with the Corps.
 - b) For non-USDA Program Participants – These determinations will be made by the Corps and do not require coordination with NRCS although copies will be provided to DEQ.
- #### 3. Other Waters of the U.S. Determinations (rivers, streams, lakes, etc.)
- a) Other waters of the U.S. are addressed in the Virginia Mapping Conventions and will be mapped only if these potential other waters will be manipulated. NRCS has no statutory authority to make “Other Waters of the U.S.” determinations.
 - b) The Corps will determine whether an area is considered to be Other Waters of the U.S. and will advise property owners/operators of any permit requirements. A copy of that determination will be provided to DEQ. NRCS will receive a copy for USDA program participants.
 - c) Ditch maintenance within an existing farm field or pasture will not require an “Other Waters”

determination provided the work does not result in a change in scope and effect (including change in cross-section width or depth).

- d) Relocating of ditches within an existing farm field or pasture will require an “Other Waters” determination.

4. Delineations (identification of on-site boundaries)

- a) Will be made under limited circumstances at the discretion of NRCS wetland team leaders or Corps staff for small areas (generally < 5 acres) when workload allows.
- b) Otherwise, delineations will be conducted by consultants (list of consultants <http://www.nao.usace.army.mil/redesign/technical%20services/Regulatory%20branch/Agents/agents.asp> and confirmed by the lead agency (NRCS or Corps).

C. Information Exchange

1. Information Exchange for Wetland Determinations

Courtesy copies of all jurisdictional determinations made by the Corps will be provided to DEQ. Courtesy copies of all jurisdictional determinations made by the Corps on portions of agricultural (or farming) operations (both agricultural and non-agricultural lands) will be provided to NRCS for USDA-program participants. These determinations will be made in a prompt and timely manner. In order to reduce potential differences between FSA and CWA, the Corps will make every reasonable effort to coordinate determinations and permit issuance and verification in the non-agricultural areas of farming operations with NRCS. The FSA does not have a minimum area in which wetland conversion for commodity crop production is acceptable, so the results of all determinations of any size must be provided to NRCS.

- 2. In cases where an activity is proposed in wetlands or water determined by Corps not to be subject to regulation under Section 404 CWA, NRCS will coordinate with DEQ.
- 3. Information Exchange For Spring Development Projects. NRCS will maintain counts of spring development projects, along with the approximate area of wetland impact associated with each project. These totals will also be reported to signatory agencies on a quarterly basis by county. No further coordination with the Corps or DEQ will be required for these projects.
- 4. NRCS will share wetland determinations and wetland determination worksheets on areas that may be regulated by the CWA or SWCL.

D. Procedures for Reporting Potential Violations

- 1. Federal employees are required to report suspected violations of federal law, including the CWA and the FSA. Timely notification of suspected unauthorized activities would facilitate timely investigation and resolution. In general, if an alleged activity is more than 5 years old, the COE does not consider it a high priority for further investigation. This limit does not apply to FSA or SWCL potential violations.
- 2. In order to investigate an unauthorized activity, the Corps, DEQ, or NRCS need to know the site location, what activities were/are being conducted, and if the work is ongoing. In addition, it is important to know whom is/was conducting the work, and when the work began. The wetland worksheet should be used to notify the Corps or DEQ of suspected CWA or SWCL violations. Corps or DEQ will notify NRCS wetland team leaders of suspected FSA violations.
- 3. During investigation of alleged unauthorized activities on farms, the signatory agencies will be afforded the opportunity to participate in site visits. Courtesy copies of all correspondence on alleged violations will be sent to the signatory agencies. All proposed resolutions of unauthorized activities will be coordinated with the signatory agencies to ensure that corrective actions are consistent with both CWA and FSA.

III. DURATION OF DETERMINATIONS

- A. Corps determinations remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a Corps representative identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.
- B. An NRCS final certification shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.

IV. TRAINING

- A. Cross-Manual Training for On-Site Wetland Calls

Inter-agency training on the Corps of Engineers' 1987 Manual for Identifying and Delineating Wetlands and on the wetland methodologies of the Food Security Act Manual (FSAM) is required before determinations or delineations are conducted on-site. Agency staffs who have not had this training are not authorized to identify or delineate wetlands on-site without the oversight of a trained agency staff person.

- B. Joint Training

Interagency training shall be held periodically to familiarize staff with aspects of signatory agencies programs that relate to wetlands and other waters of the U.S. and to improve technical abilities related to those resources.

V. TECHNICAL ASSISTANCE

At the request of the Corps or DEQ, NRCS may provide technical assistance for the identification of hydric soils. At the request of NRCS, the COE may provide technical assistance in identification of wetland criteria, including hydrophytic vegetation and determination of "Other Waters of the U.S.".

VI. CONCURRENCE ON VIRGINIA INTERAGENCY LOCAL OPERATING PROCEDURES

The following representatives of the MOA signatory agencies concur on the Virginia Interagency Local Operating Procedures as outlined in this document.

/S/

11/27-06

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DATE

State Conservationist

United States Department of Agriculture

Natural Resources Conservation Service

/S/

10/30/06

KAREN L. MAYNE

DATE

Supervisor

Virginia Field Office

Department of Interior

United States Fish and Wildlife Service

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9/25/06

J. ROBERT HUME

DATE

Chief, Regulatory Branch

Norfolk District

United States Army Corps of Engineers

/S/

10/4/06

CATHERINE M. HAROLD

DATE

Manager, Office of Wetlands & Water Protection

Virginia Department of Environmental Quality

APPENDIX A LIST OF AGENCIES/CONTACTS

U. S. Army Corps of Engineers (Corps):

General contact - Steve Martin
U.S. Army Corps of Engineers
803 Front Street
Norfolk, Virginia 23510
Phone: (757) 201-7787; FAX (757) 201-7678
steven.m.martin@usace.army.mil

Or specific Corps field offices which can be found on the Norfolk District Corps web page at:
<http://www.nao.usace.army.mil/redesign/technical%20services/Regulatory%20branch/varegions.htm>

Natural Resources Conservation Service (NRCS):

Specific contacts (Wetland Team Leaders)

Jeannine Freyman
Soil Resource Specialist
75 Hampton Boulevard
Christiansburg, Virginia 24073
Phone (540) 381-4221, Ext. 124; Fax (540) 381-4040
E-Mail -- jeannine.freyman@va.usda.gov

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Farmville, Virginia 23901
Phone (434) 392-4171, Ext. 119; Fax (434) 392-1774
E-Mail -- John.Nicholson @va.usda.gov

For a map of territory responsibilities for each wetland team, refer to Conservation Compliance section of the Virginia NRCS website at <http://www.va.nrcs.usda.gov/programs>

General contact - Julie Hawkins, Biologist
1606 Santa Rosa Road, Suite 209
Richmond, Virginia 23229-5014

Phone (804) 287-1669; Fax (804) 287-1736
E-Mail – julie.hawkins@va.usda.gov

U.S. Fish and Wildlife Service (USFWS):

Bridgett Costanzo FSA Coordinator
Bridgett_Costanzo@fws.gov
6669 Short Lane
Gloucester, Virginia 23061
Phone: (804) 693-6694, Ext. 125; Fax (804) 693-9032

Virginia Department of Environmental Quality (DEQ):

General contact - David L. Davis
DEQ Office of Wetlands & Water Protection
629 East Main Street, 9th Floor
Richmond, Virginia 23219
Phone: (804) 698-4105 FAX (804) 698-4347
Email: dldavis@deq.virginia.gov

OR

Specific Regional Office contact information can be found at the DEQ website:
<http://www.deq.virginia.gov/regions/homepage.html>

APPENDIX B USDA WETLAND DETERMINATION WORKSHEET

USDA Wetland Determination Worksheet Service Center Request				<input type="button" value="Print Form"/>	
Agency Field Office Name <input style="width: 150px;" type="text"/>		Phone Number - <input style="width: 80px;" type="text"/>		Today's Date <input style="width: 80px;" type="text"/>	
Field Office Contact - <input style="width: 150px;" type="text"/>		Signed AD-1026 on file <input type="checkbox"/>			
USDA Participant? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Current Land Use - <input type="checkbox"/> Agricultural <input type="checkbox"/> Non-Agricultural			
T&E Species Impact? <input type="checkbox"/> Yes <input type="checkbox"/> No		Land Use prior to 12/1985 - <input type="checkbox"/> Agricultural <input type="checkbox"/> Non-Agricultural			
Site Information					
Landowners Name <input style="width: 200px;" type="text"/>		Phone Number <input style="width: 120px;" type="text"/>			
Address - <input style="width: 250px;" type="text"/>		Farm # - <input style="width: 60px;" type="text"/>		Tract # - <input style="width: 60px;" type="text"/>	
City <input style="width: 80px;" type="text"/>		State <input style="width: 60px;" type="text" value="Virginia"/>		Zip <input style="width: 60px;" type="text"/>	
Operator's Name <input style="width: 240px;" type="text"/>		Operator's Phone Number <input style="width: 140px;" type="text"/>			
Additional Information (include current land cover/use) <div style="border: 1px solid black; height: 50px; width: 100%;"></div>					
Toolkit Information					
GIS Plan Name <input style="width: 160px;" type="text"/>					
Customer Business ID <input style="width: 170px;" type="text"/>		GIS Template Name (*.mxd) <input style="width: 190px;" type="text"/>			
Farm Bill Field Determination for Wetlands Wetland Team Leader					
Worksheet Control # <input style="width: 60px;" type="text"/>		Date of field visit <input style="width: 80px;" type="text"/>			
Team Member(s): <input style="width: 190px;" type="text"/>		Georeference UTM NAD83 Zone <input style="width: 40px;" type="text"/> Easting <input style="width: 80px;" type="text" value="000,000"/> Northing <input style="width: 80px;" type="text" value="0,000,000"/>			
WETLAND: <input type="checkbox"/> Yes <input type="checkbox"/> No		Cultural Resources Impact <input type="checkbox"/> Yes <input type="checkbox"/> No			
Wetland Label <input style="width: 60px;" type="text"/>		Acres (sq. Ft.) <input style="width: 60px;" type="text"/>		Wetland Label <input style="width: 60px;" type="text"/>	
Wetland Label <input style="width: 60px;" type="text"/>		Acres (sq. Ft.) <input style="width: 60px;" type="text"/>		Wetland Label <input style="width: 60px;" type="text"/>	
Potential Farm Bill/CWA Violation?: <input type="checkbox"/> Yes* <input type="checkbox"/> No *If yes, email worksheet with location map (7.5' topo) to USACE field office					
<input type="checkbox"/> Possible Abandonment (CWA) <input type="checkbox"/> Potential OW (Must be confirmed by USACE) OW feet <input style="width: 40px;" type="text"/>					
COMMENTS Is there any further coordination/consultation needed? <input type="checkbox"/> Yes* <input type="checkbox"/> No *If yes, Agency name: <input style="width: 140px;" type="text"/>					
<div style="border: 1px solid black; width: 100%; height: 100%;"></div>					
7.5' Topoquad Name <input style="width: 140px;" type="text"/>		Lat-Long - North <input style="width: 80px;" type="text"/>		West <input style="width: 80px;" type="text"/>	

APPENDIX C NRCS WETLAND MAPPING CONVENTIONS

Revised - December, 2005

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WETLAND MAPPING CONVENTIONS AND OFF-SITE PHASE WETLAND DETERMINATION PROCEDURES FOR VIRGINIA

These conventions utilize National Food Security Act Manual (NFSAM) and U.S. Army Corps of Engineers (Corps) 1987 Manual wetland delineation procedures to make determinations on land owned or operated by a USDA program participant.

These mapping conventions do not identify other federally regulated waters of the United States, such as lakes, rivers, ponds and streams. These areas do, however, fall under federal and/or state regulatory authority. See Page 4 of the Mapping Conventions for an alternate procedure to make determinations in these areas.

These conventions are intended for use only in the off-site phase of the determination process. A field ("on-site") check will be made by the Wetland Team or the Corps before the wetland determination is considered complete.

Tools to be used to conduct a off-site phase of the wetland determination: county hydric soils list (FOTG), soil surveys, weather data for imagery dates, National Wetland Inventory (NWI), Farm Services Agency (FSA) aerial slides, USDA color infrared (CIR) photos, USDA digital orthophotography, other photos, personal knowledge, United States Geological Survey (USGS) topographic maps, FSA crop history.

Notes:

Hydric Soils include:

- a. whole unit hydric soils
- b. soils that are ponded and flooded
- c. hydric soils included in non-hydric map units. (Hydric soil may occur in any soil map

unit.)

Mapping Conventions for Agricultural Land:

NOTE: An on-site confirmation is required for all of the following determinations.

- Permanent pasture or hayland + hydric soils or wetland signature or NWI or USGS topographic map wet symbol or soil survey wet symbol on moderately well drained soil = **FWP**
Note: Removal of any woody vegetation (stumping) from FWPs may constitute a wetland conversion
- Cropland1 + hydric soil (due to ponding for long or very long duration {15 consecutive days}) + wet signature (dark signature in a normal or dry year) + not abandoned = FW (Whole map unit hydric soil)²
- Cropland1 + wet signature (dark signature in a normal or dry year) + not abandoned = FW (hydric inclusion)²
- Cropland1 in Southeastern Virginia (including Chesapeake, Virginia Beach, Suffolk, Isle of Wight and Southampton Counties) + histosols (or soils with histic epipedons) + wet signature (ponds for 7 or more days or saturated for 14 or more days during growing season) + not abandoned = FW (Pocosin)
- Cropland1 + hydric soil (due to long or very long duration flooding) + 15 consecutive days flooding + wet signature + not abandoned = FW (whole map unit hydric soil)²

¹ Cropland planted to an agricultural commodity in the period December 23, 1980 to December 23, 1985.

² Refer to "Determining Presence of Farmed Wetland (FW) on Cropland" on page 9 for ponding or flooding criteria.

NOTE: These soils may not exhibit typical matrix low chroma colors.

- Cropland1 + hydric soil (sandy soil or poorly drained) + not an FW+ not abandoned (CWA purposes only) = PC (Coastal Plain only)³
- Cropland1 + hydric soil + not and FW = PC³
- Cropland1 + wet signature (due to saturation) = PC³
- Any cropland, permanent pasture or hayland + no hydric soil +no wet signature + no NWI = Non Wetland (NW)
- Any Farmed Wetland (FW) converted to increase agricultural production after November 28, 1990 = CW + yr. (An on-site confirmation is required to ascertain a CW + yr.)
- Pond on non-hydric soil or PC that was not abandoned prior to pond construction = AW
- Pond on wetland = W

³ If abandoned for five consecutive years and hydrology and woody vegetation potentially have returned, contact the Corps.

VIRGINIA PROCEDURE FOR MAKING FOOD SECURITY ACT "OTHER WATERS"⁴ DETERMINATIONS

This procedure is designed to provide a method to identify and label potential "Other Waters" (OW) and notify clients of potential permit implications.

Procedure:

1. Where manipulation that potentially involves "Other Waters" is planned:
 - If a manipulation that potentially involves "Other Waters" (OW) is planned (with or without associated wetland impacts), use the "Wetland Determination Worksheet" to notify the Corps.
 - The Corps will make the OW determination, locate and identify the area on a map and forward this information to the appropriate requesting NRCS field offices within 45 days⁵.
 - NRCS will locate and label manipulated OW areas and notify the Farm Service Agency on the NRCS-CPA-026E form as part of the Food Security Act wetland determination.
2. Where no manipulation that potentially involves "Other Waters" is planned:
 - NRCS will label the non-wetland "Other Waters" areas as NI (not inventoried)

⁴ Waters of the US, Other Than Wetlands

⁵ The Corps will be responsible to determine whether an area is considered to be "Other Waters" and to advise property owners/operators of any permit requirements

DEFINITIONS

1. Agricultural Commodity

Any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters. Examples include corn, soybeans, sorghum, barley, tomatoes, melons, etc.

2. Agricultural Land

Lands intensively used and managed for production of food or fiber. Examples are cropland, hayland and pastures, including native pastures and rangeland, orchards, vineyards, other lands used to produce or support the production of livestock and small tree farms.

3. Agricultural Use

Check definitions for further discussion of urban. Land devoted to the use and management of land for production of food, fiber, or horticultural crops.

4. Artificial Wetland (AW)

Formerly non-wetland under natural conditions, but now exhibits wetland characteristics due to human activities: includes impoundments and dugout ponds built on either non-wetland (NW) or prior converted cropland (PC).

5. Cropland

Refers to agricultural land planted to an agricultural commodity (annually planted crop) at least once every five years or in a formal state or federal set-aside program. Also includes pasture or hayland in commonly used rotation with an agricultural commodity. Examples of agricultural commodities include corn, soybeans, sorghum, barley, tomatoes, melons, etc.

6. Converted Wetland (CW and CW + year)

Wetland manipulated after December 23, 1985, to the extent that production of an agricultural commodity is possible, even if such crop is not actually planted. Manipulation includes removal of woody vegetation (cleared and stumped) and/or modification of wetland hydrology by draining, filling, leveling, etc., or any activity that results in impairing or reducing the flow, circulation, or reach of water.

CW is converted prior to November 28, 1990 and CW + year are converted on or after November 28, 1990.

7. Farmed Wetland (FW)

FW meets the following:

- Manipulated and used to produce an agricultural commodity at least once prior to December 23, 1985 but had not been converted prior to that date.
- Area still meets wetland hydrology criteria and either seasonally floods or ponds for extended periods of time (at least 15 consecutive days during the growing season).
- Area not abandoned.

8. Farmed Wetland Pasture or Hayland (FWP)

FWP meets the following:

- Manipulated and managed for pasture or hayland prior to December 23, 1985, but still meets wetland hydrology criteria
- Area not abandoned.
- Permanent pasture or hayland.

9. **Growing Season⁶**

The growing season is defined as that part of the year when soil temperatures at 19.7 inches below the soil surface are higher than biologic zero (5 degrees C).

In Virginia it can be approximated as the period of time between:

The average date of the last killing frost (28°F) in the spring

AND

the average date of the first killing frost (28°F) in the fall.

10. **Non-Agricultural Land**

Lands where natural vegetation has not been removed or has returned even though grazed, mowed, or collected as forage or fodder. Includes forestland, wood lots, tree farms and uncultivated meadows, and pastures.

11. **Other Waters of the U.S.**

Other waters of the U.S. refer to all waters other than wetlands. Work in "other waters of the US" (including placement of fill, excavation, grading, and placing structures) may require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

Waste treatment systems, including treatment ponds or lagoons are generally not waters of the US and work in these systems may not require authorization from the Corps; however, if abandoned these may become waters of the U.S.

The complete regulatory definition of waters of the US is listed in the Corps regulations at 33 CFR 328.3. The jurisdictional limits of waters of the US are defined at 33 CFR 328.4.

12. **Prior Converted Cropland (PC)**

Wetlands that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated including the removal of woody vegetation for the purpose of, or to have the effect, of making the production of an agricultural commodity possible and an agricultural commodity and an agricultural commodity has been produced at least once before December 23, 1985.

13. **Small Tree Farm**

Where trees are treated as nursery stock, i.e., removal from the ground for landscaping or Christmas trees nurseries.

14. **USDA Program Participant**

Any producer enrolled in or applying for a current USDA program

⁶ Refer to National Food Security Act Manual, Fifth Edition, part 514.05c.

Note that the U.S. Fish and Wildlife Service do not utilize this definition for the purposes of wetland determination under the National Wetlands Inventory (NWI).

Waters of the US

Include wetlands, lakes, streams (perennial and intermittent), ponds (created through excavation or impoundment), rivers, territorial seas, all tidal waters (including tidal drainage ditches), mudflats, sand flats, sloughs, prairie potholes, wet meadows, playa lakes, pocosins, abandoned borrow pits, etc.

15. Wetlands that have been manipulated (WX)

A wetland that:

- was manipulated after December 23, 1985
- was not for the purpose of and did not make production of agricultural commodities possible
- is undergoing an action leading toward wetland conversion.

Examples

Clear cutting wooded wetland (without stump removal).

Drainage ditch through or adjoining a wooded wetland

DETERMINING ABANDONMENT⁷

Cropland (Applies to FW)

Use 1985 or 1986 imagery; and current year slide or digital orthophotography plus photography taken 5 years prior and FSA cropping history for same years.

NOTE: Bracket the most current 5-year period with photography.

Requires on-site evaluation to determine if wetland criteria have returned (abandonment). If criteria have returned, area is **W**.

-- Area is **W** if land has been idle for preceding 5 years; otherwise remains **FW**.

NOTE: Set-aside, CRP, or other conservation use programs do not constitute abandonment. Land in these programs is considered being actively cropped.

Pasture or Hayland (Applies to FWP)

Requires on-site evaluation

Suggested items to evaluate for abandonment:

(Presence of the following indicates active management, i.e., not abandoned)

- Fence maintenance
- Livestock movement (trails, etc.)
- Use of water facilities and streams
- Presence of livestock
- Presence of young woody vegetation
- Evidence of grazing/clipping
- Presence of hay bales

⁷ FW and FWP are not subject to abandonment for Farm Bill purposes only if the person provides hydrologic and vegetative baseline conditions prior to allowing the site to revert to wetland (W)

DETERMINING PRESENCE OF FARMED WETLAND (FW) ON CROPLAND

FW only applies where ponding or flooding occurs for 15 or more days in the growing season.

NOTE: Exceptions to these are former Pocosin wetlands in Southeastern Virginia. See page 2 of Mapping Conventions.

Generally at least 5 years of photographic imagery in a 10-year period is needed to make FW determinations. In some cases, 3 years of photographic imagery taken in normal rainfall conditions may be adequate. If all three years either clearly show a wet signature OR clearly do not show a wet signature for a given site, then the determination can be made without the use of additional imagery.

If the imagery from 3 normal years is inconclusive, then additional imagery will be required for the determination. For example, one of the 3 may show a signature, but the other 2 do not. In this situation, imagery must include either 2 additional normal years OR equally weighted between dry and wet years. Therefore, if > 3 years of imagery is needed to reach a conclusion, and no more normal years are available, then imagery from one dry and one wet year will be needed to reach a final FW determination.

If at least three years out of either three or five years of imagery as discussed above indicate one or more of the following, then 15 consecutive days of ponding or flooding is assumed.

- Drowned crop.
- Lush growth (darker green, etc.) in a dry period.
- Light green or yellow in a normal period.
- Late planting date or avoidance.
- Absence of crops.
- Ponded water.

NOTE: Sites not meeting above criteria are labeled PC.

Determination Summary:

- If all 3 years of normal imagery are positive = Positive FW Determination
- If all 3 years of normal imagery are negative = Negative FW Determination
- If 3 years of normal imagery give mixed positive and negative results---> Use 5 years of imagery
- For min. 5 years of imagery, use combinations of normal (N) and equal number of dry (D) and wet (W) years. Examples: NNNWD, NNNNN, NNNNDW (Must have equal no. W & D years).

APPENDIX D AG EXEMPTIONS

COE regulations (33 CFR 323.4) explained

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/33cfr323.htm>

DEQ regulations explained <http://www.deq.virginia.gov/wetlands/wetlands.html>

APPENDIX E ENFORCEMENT ACTIVITIES

1. Corps/EPA/DEQ Enforcement (See 33 CFR 326)

Activities in wetlands and Other Waters of the United States that may require COE or DEQ authorization include placement of fill, excavation, mechanized land clearing, stumping, grading, and placement of some structures. Enforcement involves the investigation and resolution of potentially unauthorized activities by the Corps, EPA and/or DEQ.

If the activity appears to be in violation of CWA, the Corps may order the participant to halt all work in wetlands and Other Waters of the U.S. (a Cease and Desist Order). Failure to comply with the cease and desist order can result in civil and/or criminal penalties. The Corps may also refer the case to EPA for further administrative, civil, or criminal actions.

Generally, the Corps, DEQ and EPA prefer to see the participant take voluntary measures to correct a violation; however, either the Corps, DEQ or EPA can direct the participant to take corrective actions. Occasionally, the participant will not cooperate with the Corps, at that point, the Corps may refer the case to EPA or choose to take legal action (civil or criminal). EPA can assess administrative penalties of up to \$125,000 for unauthorized activities.

In the event that a participant will not cooperate with DEQ to voluntarily correct a violation, the participant may be subject to injunctive relief requiring compliance with wetland law and regulations as well as civil penalties of up to \$32,500 per day of each violation of the same. In addition, Va. Code § 62.1-44.15 authorizes the State Water Control Board to issue orders to any person to comply with the State Water Control Law and regulations, including the imposition of a civil penalty for violations of up to \$100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the State Water Control Law and regulations, and to impose a civil penalty of not more than \$10,000. Va. Code §§ 62.1-44.32 (b) and 62.1-44.32 (c) provide for other additional penalties.

2. NRCS Enforcement

The FSA prohibits those farmers that are currently receiving USDA program benefits from making commodity crop production possible in wetlands. In a forested wetland, for example, commodity crop production would be possible once the trees and stumps were removed.

If a FSA swampbuster violation is found by NRCS, it will request a Form FSA-569 from the USDA Farm Service Agency (FSA). NRCS will also determine if a violation of FSA has occurred if reported on a Form FSA-569 by FSA. Processing this form may result in suspension of the participant's USDA benefits. Benefits may be restored pending restoration or mitigation of the impacted wetland area on a converted wetland plus year (CW + year), or after cessation of cropping on a converted wetland (CW).

Whistleblower complaints may be received either verbally or in writing, and may come from any source. All complainants are to remain anonymous, unless the complainant indicates otherwise. The name of the whistleblower shall not be maintained in the case file but should be maintained in a separate "Report of Possible Noncompliance" register. Whistleblower complaints referred to NRCS on form FSA-569 should be completed within 30 days in a field office and/or within 45 days in an area or state office.

**APPENDIX F CORPS-USFWS MOA – PARTNERS FOR WILDLIFE WETLAND
RESTORATION SITES EXEMPT FOR USE IN MITIGATION**

COPY

Bruce

**Local Operating Procedures between the
Virginia Field Office, U.S. Fish and Wildlife Service
and the Norfolk District, Corps of Engineers**

**Regarding Limitations on the Use of Voluntary Habitat Restoration
Projects in Virginia for Mitigation Credits**

Landowners can enter into an agreement with the U.S. Fish and Wildlife Service (Service) under their Partners for Fish and Wildlife Program (PFW) to receive cost share and technical support to voluntarily restore wetlands and streams. Partners for Fish and Wildlife, and other voluntary restoration programs, were established by Congress to be a source of net gain in aquatic resources. During the duration of the PFW landowner agreement, generally 10-25 years, the site cannot be used for mitigation credit. However, the terms of the PFW agreement allow the landowner to terminate the agreement if he/she reimburses the Service for their cost of the project.

According to the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks published in the Federal Register on November 28, 1995 by the Corps of Engineers (Corps), Environmental Protection Agency, the Natural Resources Conservation Service, U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, wetlands restored through the PFW program or similar programs cannot be used to generate credits from a mitigation bank (See Paragraph II. Policy, Considerations, B. Planning Considerations, 2. Site Selection). No such guidance document exists for stream mitigation issues.

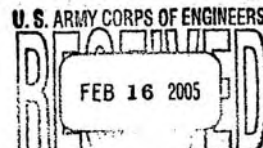
The Corps and the Service are concerned that landowners may use the PFW program to have wetlands/streams restored, terminate the PFW agreement, and then use these acres toward mitigation for impacts authorized through the regulatory program. Such a practice would negate the benefits of the PFW program, and use Federal tax dollars to supplement restoration of wetlands/streams for use as mitigation for private development projects. It is the joint position of the Corps and the Service that PFW restored habitats not be allowed to be used as restoration credit as part of a site-specific mitigation plan or mitigation bank. Such wetlands/streams may be considered as preservation credit, as mutually agreed upon by the Corps of Engineers and the Service. In all cases, the use of PFW restored wetlands as preservation would require that the preservation credit not be used to reduce the compensatory wetland restoration to less than a one to one ratio.

Karen L. Mayne
Karen L. Mayne
Project Leader
Virginia Field Office
U.S. Fish and Wildlife Service

2/14/2005
Date

J. Robert Hume, III
J. Robert Hume, III
Chief, Regulatory Branch
Norfolk District
Corps of Engineers

8 Feb 05
Date



APPENDIX G CORPS JOINT PUBLIC NOTICE – RESTORATION AGREEMENT SITES NOT SUITABLE FOR MITIGATION



Joint Public Notice

U.S. Army Corps of Engineers, Norfolk District
Virginia Department of Environmental Quality

June 21, 2005

Existing Federal Programs to Restore Wetlands and How Such Areas Will Be Considered in the Review of Permit Applications

Landowners can enter into an agreement with the Natural Resources Conservation Service (NRCS) under the Conservation Reserve Program or the U.S. Fish and Wildlife Service (FWS) to receive cost share and technical support to voluntarily restore wetlands and streams. Such programs were established by Congress to be a source of net gain in aquatic resources. During the duration of the program landowner agreement (generally 5-33 years for NRCS programs and 10-25 years for FWS programs), the site cannot be used for mitigation credit. However, the terms of the program agreement allow the landowner to terminate the agreement if he/she reimburses the respective Service for their cost of the project.

According to the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks published in the Federal Register on November 28, 1995 by the Corps of Engineers (Corps), Environmental Protection Agency, the Natural Resources Conservation Service, U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, wetlands restored through the Conservation Reserve Program or similar programs cannot be used to generate credits from a mitigation bank (See Paragraph II. Policy, Considerations, B. Planning Considerations, 2. Site Selection).

In accordance with the Federal Mitigation Banking Guidance, Federally-funded wetland mitigation projects such as described above cannot be used to generate credits within a mitigation bank. In addition, we will not allow such restored habitats to be used as restoration credit as part of a site-specific mitigation plan. However, we may consider such wetlands for preservation credit. In all cases, the use of such restored wetlands as preservation credit will be at a minimum of a 10:1 ratio and cannot be used to reduce the restoration or creation component of the compensatory mitigation to less than a 1:1 ratio.

J. Robert Hume, III
Chief, Regulatory Branch
Norfolk District, Corps of Engineers

Catherine M. Harold, PWS
Manager, Office of Wetlands and Water Protection
Virginia Department of Environmental Quality